FEDERATION REPORTS.

GOH AH YEW v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Spenser-Wilkinson, and Russell, JJ.) November 4, 1948]

[Federation of Malaya — Crim. Appeal No. 122 of 1948]

Criminal Procedure Code Ss. 163, 164, 165, 166, 169, 170, 186, 198, 199 — Joint trial — Trial with the aid of assessors — Meaning of accomplice — Burden of proof — Witness of accused — Evidence Enactment S. 114 (g).

In this case the appellant was charged (1) with carrying arms or alternatively with carrying component parts of a firearm and (2) with consorting. The trial took place with the aid of assessors. At the conclusion of the case of the prosecution, the learned trial Judge directed the assessors only on the first charge and did not deal in any way with the second charge. One of the assessors expressed the opinion that the appellant was guilty on the alternative charge and thereupon the learned Judge convicted the appellant on the alternative charge and on the second charge. On the first charge, one of the witnesses was a self-confessed bandit Tan Bock Lee under sentence of death, who gave evidence that he had seen the appellant in the bandit camp in the jungle and had seen him carrying a sten-gun. The learned trial Judge directed the assessors that in a charge of carrying a gun there could not be an accomplice and that the witness, Tan Bock Lee, was therefore not an accomplice. The learned Judge however went on to treat the evidence of the witness as no better than that of an accomplice and directed the assessors that his evidence required corroboration.

Held, (a) that where two charges are joined in one trial and one charge is a charge for which assessors are required and the other charge is not a charge for which assessors are required, then such trial is a "trial with Assessors" in respect of both charges and the opinion of the assessors must be asked for on both charges; (b) that the conviction of the accused in this case upon the second charge by the Judge alone without his having first asked the Assessors for their opinions on that charge was an illegality which cannot be cured under S. 422 of the Criminal Procedure Code and that the conviction on this charge cannot stand; (c) that the view that the term accomplice is confined to a person who is guilty of the same offence as the accused is wrong and that as the evidence showed that the witness in this case concurred in the criminal designs for a certain time, he was therefore an accomplice; (d) that even although the learned trial Judge was wrong in finding and directing the Assessors that the witness was not an accomplice, the assessors were sufficiently warned by him as to the danger of accepting his uncorroborated testimony; (e) that there was in fact corroboration of the witness's evidence sufficient to entitle the assessors to accept his evidence and therefore the appeal on the first charge must be dismissed; (f) that an accused person is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other and that therefore the Deputy Public Prosecutor in this case was wrong in inviting the assessors to draw an inference against the appellant by reason of his failure to call a witness who was present in Court and available; (g) that in a criminal prosecution the onus of proof is upon the prosecution and there is no obligation upon the prisoner of proving facts especially within his own knowledge and that therefore the Deputy Public Prosecutor at the trial was wrong in submitting that the burden of proving that the firearm carried by the appellant was capable of firing was shifted in some way to the appellant.

Cases referred to :—

(1) *The Queen v. Matam Mal* (1874) 22 W.R. 34.
(2) *King Emperor v. Pirumal Reddi* (1901) 24 M. 523.
(3) *Appaya Baslingappa Honnapur v. Emperor* (1924) A.I.R. Bombay 246.
(4) *Pattikadan Ummaru v. Emperor* (1902) 26 Madras 243.
(5) *Emperor v. Changouda Pirgouda* (1920) I.L.R. Bombay 619.
(6) *Abdul Rahim v. Public Prosecutor* (1939) F.M.S.L.R. 211; (1939) M.L.J.
(7) *Rex v. Mullins* 3 Cox C. C. 526.
(8) *Emperor v. Dhunno Kazi* 8 Cal. 121 at page 125.
(9) *Attygalle v. Rex* (1936) 2 A.E.R. 116.
(10) *Seneviratme v. Rex* (1936) 3 A.E.R. 36.
(11) *King v. Kakelo* (1923) 2 K.B. 793.
(12) *Woolmington v. Director of Public Prosecutions* (1935) A.C. 462.

CRIMINAL APPEAL.

C. M. P. Pillai for the Appellant.

A. M. I. Austin (D. P. P.) for the Respondent.

The judgment of the Court of Appeal was delivered by :—

Spenser-Wilkinson, J. : — In this case the appellant was charged first with carrying firearms or alternatively with carrying component parts of a firearm and secondly with consorting. The trial took place with the aid of Assessors in accordance with section 184 of the Criminal Procedure Code. At the conclusion of the case of the prosecution, however, the Deputy Public Prosecutor stated that upon the second charge the Assessors' opinions were not required. The learned Judge in summing up to the Assessors did not deal in any way with the second charge and did not ask for the Assessors' opinions thereon and after convicting the appellant on the alternative charge upon which one of the Assessors had expressed the opinion that he was guilty, the learned Judge himself convicted the appellant on the second charge.

In our view this procedure was illegal and unauthorised by the provisions of the Criminal Procedure Code.

Section 163 of the Criminal Procedure Code lays down that for every distinct offence there shall be a separate charge and that every such charge shall be tried separately except in the cases mentioned in sections 164, 165, 166 and 170. When, therefore, an accused person is about to be tried and more than one charge has been framed against him, it is in the discretion of the Public Prosecutor in cases where sections 164, 165 or 166 apply, to elect whether the accused should be tried at one trial for more than one offence or to ask for separate trials on each of the separate charges. If any of the charges joined in pursuance of this election is punishable with death, then, under the provisions of section 184, the accused must be tried with the aid of Assessors. Having, however, joined more than one charge in the same trial it is then one trial. The trial commences under the provisions of section 186 as soon as the accused refuses to plead or claims trial and concludes either under section 198 with an acquittal or, in case of a conviction under section 199 with a sentence or sentences.

It is, we think, quite impossible to argue that where there are two charges against an accused, one of which is punishable with death and one of which is not punishable with death, that he can at one and same moment be tried upon the one charge by a Judge with the aid of Assessors and upon the other charge by a Judge "alone", while the Assessors are present. A trial is one and indivisible, and is either with Assessors or without Assessors. If the trial is with the aid of Assessors then their opinions must be sought upon all the charges upon which the accused is tried in that trial and the whole of the provisions of Chapter XXI must be observed.

While it is true that in a trial with the aid of Assessors the accused is not placed in the charge of the Assessors in the same way that an accused is in the charge of a Jury on a trial by Jury, yet, in this country, on a trial with Assessors the accused is, to some extent, in their hands. For unless and until the prosecution can convince at least one Assessor that the accused is guilty of the charge he cannot be convicted on that charge. Once, therefore, a trial with the aid of Assessors has commenced the accused is entitled to have all the charges put before the Assessors and is thus entitled to the benefit of the fact that without the adverse opinion of at least one Assessor he cannot in that trial be convicted in respect of any charge.

The same point may be put in another way. In a trial with the aid of Assessors the Judge has no power to convict unless at least one Assessor is of opinion that the accused is guilty. This being so the trial Judge cannot overcome this difficulty by claiming that whilst the trial with Assessors was proceeding upon a capital charge he was at the same time notionally trying the accused (by himself) on a lesser charge. Either the charges are joined in one trial or they are not. If they are not so joined then the trials must be distinct and *must* take place on separate occasions; if they are joined then they are joined in one trial with Assessors and the Assessors must take cognizance of everything which is alleged against the accused.

There appear to be no local authorities bearing upon this question. There are, however, Indian authorities which give some support to the view we have expressed. Indian authorities in regard to trials with the aid of Assessors are not always directly in point in this country partly because in a trial with the aid of Assessors in India the Judge is not bound by the opinions of the Assessors; and partly because a Sessions Judge never sits as a Judge alone but always either with a jury or with Assessors. Moreover, in 1923 section 309 (i) of the Indian Criminal Procedure Code (which up till then had been identical with our section 197) was amended so as to make it clear beyond all doubt that the opinions of the Assessors had to be obtained on all the charges on which the accused had been tried. But in spite of the fact that Assessors in India occupy a less important position than they do here it has been held ever since 1874 that where an accused is tried on more than one charge the Assessors should give a definite opinion in regard to each of the offences charged. *The Queen v. Matam Mal*[1], *King Emperor v. Pirumal Reddi*[2], *Appaya Baslingappa Honnapur v. Emperor*[3]. In the last cited case it was held that it is imperative for the Judge to take the opinions of the Assessors on the charge it is proposed to convict the accused on. It is clear from the report that this case proceeded upon the Indian Section 309 before it was amended.

The only authorities which might perhaps be considered as departing in any way from this view are *Pattikadan Ummaru v. Emperor*[4] and *Emperor v. Changouda Pirgouda*[5]. These decisions, however, were not strictly upon the same point and in each case the two learned Judges who decided the case gave different reasons for their decisions. Indeed in the first case their decisions were different so that the case is no authority for any proposition whatsoever.

With regard to the second case, we are unable with all respect, to follow the reasoning of the learned Judges and would not be prepared to follow that

decision, which was to the effect that a Sessions Judge trying a case with Assessors might alone convict the accused on a minor offence with which he was not charged although in fact that minor offence was triable in India by Jury. One of the learned Judges based his decision upon one of the judgments in *Pattikadan's* case[4]. He held in effect that section 238 of the Criminal Procedure Code (our section 169) gives power to a Court to convict for a minor offence which such Court otherwise has no power to try. We feel bound to record our dissent from such a proposition. The other learned Judge having stated that the Court which is competent to try the accused for the higher offence is competent to convict him of the minor offence (with which we respectfully agree) then proceeded to hold that the Sessions Judge alone (who in India has no power to try any offence at all — vide section 268 of the Indian Code) had power to convict for the minor offence. We regret we are unable to follow this reasoning.

The constant and settled practice of the Courts of this country in murder cases has always been to take the opinions of the Assessors upon all the possible alternatives — such as culpable homicide, grievous hurt or merely causing hurt. We think that practice bears out the views we have expressed above and that that practice is right.

For the above reasons we are of opinion that the conviction of the accused in this case upon the second charge by the Judge alone without his having first asked the Assessors for their opinions on that charge was an illegality which cannot be cured under section 422 of the Criminal Procedure Code and that the conviction on this charge cannot stand.

With regard to the first charge in respect of which the procedure was correct the most important question that arises is as to the position of the main prosecution witness Tan Bok Lee. This man was a self-confessed bandit under sentence of death for the carrying or possession of arms who gave evidence that he had seen the appellant in the bandit camp in the jungle and that he had there seen him carrying a Sten Gun. The question arises whether this witness is an accomplice or must be treated as an accomplice and if so whether the directions of the learned trial Judge in this respect were adequate and whether there was in fact sufficient corroboration of this witness's evidence.

It was argued on behalf of the prosecution in the Court below and the argument was repeated before us on the appeal that it is only a person who can be jointly charged with the *same* offence as the accused who is an accomplice. It was further argued that as there can be no joint carrying of arms there can be no accomplice to the offence of carrying arms. The learned Judge in his summing up directed the Assessors that in a charge of carrying a gun there cannot be an accomplice and that the witness Tan Bok Lee was therefore not an accomplice. He did, however, go on to treat the evidence of this witness as no better than that of an accomplice and directed the Assessors that his evidence required corroboration.

We must dissent from the proposition that it is only one who could be jointly charged with the same offence as the accused who is an accomplice. In *Abdul Rahim v. Public Prosecutor*[6], Murray Aynsley J. expressed the view that those Indian cases which appear to narrow the meaning of the term accomplice to a person who is guilty of the same offence as the accused are wrong. With this view we agree. No doubt the learned trial Judge, in directing the Assessors that in a charge of carrying arms there cannot be an accomplice, was confining himself to the particular facts of this case. In that respect we agree with him but we are not prepared to hold that in respect of such a charge there could never, in any circumstance, be an accomplice.

In the present case the position of the witness in question as an accomplice is determined, in our view, in another way. The appellant in addition to being charged with carrying an arm was also charged with consorting with others who carried arms. We would refer in this connection to the case of *Rex v. Mullins*[7]. *Sarkar* on Evidence misquotes this case. An alleged passage from the judgment of Maule, J. in the case is given but nowhere in the judgment does this passage appear. It seems clear that the Deputy Public Prosecutor at the trial was quoting from the text-book and not from the decided case. This demonstrates the danger of the habit, which is unfortunately only too frequent among members of the Bar here of citing passages from the text-books, not as part of their argument, but as authorities, instead of citing the actual decisions upon which they intend to rely. In the judgment in *Rex v. Mullins* Maule, J. after dealing with two witnesses whom he classes as spies proceeds to discuss two other witnesses in the following words :—

> Barrett and Baldwinson on the other hand were really Chartists, concurring fully in the criminal designs of the rest for a certain time until, getting alarmed or from some other causes, they turned upon their former associates and gave information against them. These persons may be truly called accomplices.

Upon this authority the witness Tan Bok Lee in this case when considered in connection with the offence of consorting appears to us to have been an accomplice. The Deputy Public Prosecutor attempted to argue before us that whilst giving evidence upon one charge a witness may be considered as an accomplice and yet in considering the evidence of the same witness in the same trial on a different charge it would not be necessary to look for corroboration if he were not an accomplice in respect of that different charge. This might be a possible position if the transaction in respect of which the witness was an accomplice was completely different both in time and place from the transaction out of which the charge against the accused arose; but we cannot accept this contention in a case of this kind where the witness was an accomplice in respect of a part of the criminal transaction out of which the charges in the case arose. Once the evidence of a witness has been rendered unworthy of credit by reason of his complicity in one offence then his credit has gone for all purposes in that trial. A witness cannot be regarded as a split personality who is worthy of credit at one moment and unworthy of credit at the next. Especially is this true in regard to the witness in this case who is under sentence of death and who admits that he was angry with all his confederates because they had deserted him.

We thus have no doubt that in this case the witness was an accomplice. We are of opinion, however, in spite of the learned trial Judge's finding that he was not an accomplice, that the Assessors were sufficiently warned by him as to the danger of accepting his uncorroborated testimony and that there was corroboration of the witness's evidence sufficient to entitle the Assessors to accept his evidence. The accused admitted in his statement to the police not only that he had voluntarily joined the Anti-British Army and that he was in the bandit camp at the time when the witness said he was there, but he also admitted that every one there was armed and that he himself was provided with a rifle. There is, it is true, a discrepancy regarding the description of the weapon. The appellant says that it was a rifle whereas the witness referred to a Sten gun. But it is to be observed that a Sten gun is in fact a rifled weapon and it is common knowledge that Chinese use terms such as "long firearm" and "short firearm" in describing weapons and that these terms are often translated as pistol, revolver, rifle and so on.

We think, looking at the evidence as a whole, that there was evidence upon which the Court could properly arrive at the conclusion it did and the conviction of the appellant upon the charge of carrying arms must therefore stand.

Before finally disposing of this appeal, however, there are various points which were raised in the course of the argument at the trial (some of which were mentioned before us) upon which we feel that we ought to express an opinion. In the course of a long address to the Assessors the Deputy Public Prosecutor who conducted the trial in the Court below put forward various propositions of law which were quite untenable. In the first place, he invited the Assessors to draw an inference against the appellant by reason of his failure to call a certain witness who was present in Court and available. He relied upon paragraph (g) of section 114 of the Evidence Enactment as showing that a presumption arose that the evidence of this witness would not have corroborated that of the appellant. No such inference, however, can be drawn against an accused in a criminal trial. There is no duty upon an accused to call any evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other. *Emperor v. Dhunno Kazi*[8] and see *Woodroffe* on Evidence 9th Edition at page 813; *Sarkar* on Evidence 5th Edition 865.

The other point with which we desire to deal is the submission by the Deputy Public Prosecutor in the Court below (a submission which was not supported by the Deputy Public Prosecutor who argued the appeal) that in some way the burden of proving that the firearm carried by the appellant was capable of firing was shifted on to the appellant. It is a little difficult to be sure upon what this argument was intended to be based. The Deputy Public Prosecutor after referring to various facts and the inferences which he suggested from those facts cited section 106 of the Evidence Enactment as his authority. He then cited *Attygalle v. Rex*[9] and *Seneviratme v. Rex*[10] authorities which one would have thought were sufficient to dispose completely of the argument they were cited as supporting. The relevant portion of the head note in *Seneviratme's* case, for example, reads as follows :—

> In a criminal prosecution the onus of proof is upon the prosecution and there is no obligation upon the prisoner of proving facts especially within his own knowledge.

It seems probable that what the Deputy Public Prosecutor really intended to rely upon was a dictum in the case of *King v. Kakelo*[11] which he had also cited, to the effect that the *onus* in the course of a case can shift from one side to the other and in considering the amount of evidence necessary to shift the burden

the Court has regard to the opportunities of knowledge with respect to the facts to be proved which may be possessed by the parties respectively. That case, however, was one in which the *onus* of proving that the accused was an alien was expressly placed upon him by statute; and if and in so far as the remarks of the Court in that case were intended to apply generally to criminal cases, they are in our opinion *obiter* and in any case must be taken to have been over-ruled by *Woolmington v. Director of Public Prosecutions*[12].

It is a little difficult to understand why the Deputy Public Prosecutor found it necessary to make these long and involved submissions in a case which was in fact a very simple one, depending as it did substantially upon whether the evidence of Tan Bok Lee was or was not believed. Untenable propositions of law put before Assessors may well prejudice an accused if those submissions are not corrected by the learned Judge in his summing up and an unnecessary burden is thus cast upon the trial Judge when such submissions are made.

As we have already remarked the learned Judge in this case summed up the law correctly to the Assessors except upon the one point of whether the principal witness was an accomplice or not and as has already been pointed out he treated this witness on the same footing as an accomplice. We think, therefore, that the Assessors had all the relevant matters properly put before them. The result is that the conviction of the appellant upon the charge of consorting is quashed (no sentence was passed in respect of this charge) and the conviction upon the charge of carrying component parts of a firearm is upheld and the sentence confirmed.

Conviction Varied Accordingly.

PUBLIC PROSECUTOR v. LIM GEOK CHING & TAN YOW.

[Revisional Cr. Juris. (Pretheroe, J.) April 28, 1949]

[Malacca — Cr. Revision No. 1 of 1949]

Opium and Chandu Proclamation, Paragraph 17(1) — Forfeiture of lorry in which opium was found — Necessity of establishing some degree of complicity of owner.

The Petitioner, Lee Geok Chong in this revision was the owner of three motor lorries. On the 26th October, 1948, two of the Petitioner's employees were convicted of having in their possession (hidden in a lorry belonging to petitioner but in their charge) 8 slabs of opium. At that trial the Petitioner's lorry was forfeited. On appeal the conviction of the second defendant was quashed and the order regarding the forfeiture of the lorry was set aside and it was ordered that the owner (the present Petitioner) be given an opportunity to appear before the District Judge to show cause why the lorry should not be forfeited. In pursuance of this order the Petitioner appeared before the Judge, who confirmed the forfeiture.

Held, that in the case of a highly penal provision like that contained in paragraph 17 (1) of the Opium and Chandu Proclamation, it is necessary to establish some degree of complicity on the part of the owner of a vehicle before the forfeiture of the vehicle can be ordered.

Case referred to :—

(1) *Cheng Kee Huat and Another v. Public Prosecutor* (1948) M.L.J. 53.

CRIMINAL REVISION.

Bell for Petitioner.

Pretheroe, J. : — The petitioner in this revision is the owner of three motor lorries. On the 26th October, 1948, two of petitioner's employees were convicted of having in their possession (hidden in a lorry belonging to petitioner but in their charge) eight slabs of opium. At that trial the learned trial Judge ordered that the petitioner's lorry be forfeited. On appeal the conviction of the second defendant was quashed and the order regarding the forfeiture of the lorry was set aside and it was ordered that the owner (the present petitioner) be given an opportunity to appear before the learned District Court Judge to show cause why the lorry should not be forfeited. In pursuance of this order the petitioner appeared before the Judge, whose title had in the meantime been changed to President of the Sessions Court, on the 2nd of February last and set forth his grounds. The learned President delivered a considered judgment on the 4th February confirming the forfeiture. In this revision the petitioner prays that this decision be reversed.

In his carefully prepared judgment the learned President stated his reasons for coming to the conclusion that the petitioner was not a completely innocent party in the matter as protested by petitioner himself. With great respect I find it difficult to follow the learned President's arguments on this one point. He states that he was unable to believe the petitioner's protestations of innocence partly because he himself constructed the bodywork of the lorry in question and he himself drove that lorry for about a month after such construction. But these facts alone do not prove knowledge of the petitioner because, according to the record, such construction must have taken place some two years previously and there is ample evidence that during that period the lorry was frequently in the sole control of the driver in such circumstances as to afford him ample opportunity if he so desired to sub-divide the tool boxes so that they afford hidden recesses.